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No. 98-2060

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In the Supreme Court of the United States

RONALD D. EDWARDS, WARDEN,
Petitioner,

v.

ROBERT W. CARPENTER,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY*
State Solicitor
**Counsel of Record*
DAVID M. GORMLEY
STEPHEN P. CARNEY
Associate Solicitors
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980

BEST AVAILABLE COPY

41pp

QUESTION PRESENTED

Whether a federal habeas court is barred from considering an ineffective-assistance-of-counsel claim as "cause" for the procedural default of another habeas claim when the ineffective-assistance claim is itself procedurally defaulted.

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OPINIONS BELOW

The opinion of the court of appeals, *see* Joint Appendix (J.A.) 51-66, is reported at 163 F.3d 938. The opinion of the district court (J.A. 32-50) is unreported. The opinion of the Ohio Supreme Court (J.A. 21-22) is reported at 74 Ohio St. 3d 408, 659 N.E.2d 786. The opinion of the Ohio court of appeals (J.A. 17-20) is unreported. Citations to these opinions in this brief refer to the copies contained in the Joint Appendix, as explained in the Table of Contents therein.

JURISDICTION

The court of appeals entered its judgment on December 18, 1998. A petition for rehearing was denied on March 24, 1999. J.A. 67. The petition for a writ of certiorari was filed on June 22, 1999, and was granted on November 8, 1999. J.A. 68. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

3. Relevant provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, 28 U.S.C. 2254(b)(1), provide:

§ 2254. State custody; remedies in Federal courts

***

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State

corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

4. Rule 26(B)(1) of the Ohio Rules of Appellate Procedure provides in relevant part: "A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time."

The complete text of the rule is reproduced in an appendix to this brief.

STATEMENT

1. State court proceedings. Respondent Robert W. Carpenter pleaded guilty to the crimes of aggravated murder and aggravated robbery in an Ohio trial court in 1990. Those charges stemmed from the murder and robbery of 73-year-old Thelma Young, who had been bludgeoned to death with a blunt object in her Columbus, Ohio home on the evening of October 5, 1988.

Carpenter entered his guilty pleas in accordance with *North Carolina v. Alford*, 400 U.S. 25 (1970).[1] Though he claimed that he had not committed the crimes charged in the

[1] Carpenter's pleas were conditional. That is, the prosecution agreed that he could withdraw his guilty pleas and go to trial if the three-judge panel that accepted his pleas elected to impose the death penalty after hearing from both parties during the mitigation hearing.

indictment, there was – as his lawyers explained to the state trial court, and as he agreed – "a very strong likelihood that he would be found guilty." (Transcript of 3/29/90 plea hearing at 14, filed as record entry #5 in the district court.)[2] The prosecution gave a detailed statement of the facts to the trial court (in this case, a three-judge trial-court panel). That statement fills 30 pages of transcript in the record of the state-court proceedings. Following that statement, Carpenter's counsel declined to add anything further or contest the statement.

The three-judge panel then accepted Carpenter's guilty pleas, unanimously finding beyond a reasonable doubt that he had indeed purposely caused the death of Thelma Young and had committed a robbery in her home. (J.A. 9-16; Tr. of 3/29/90 plea hearing at 71-72, filed as record entry #5 in the district court.) After conducting a sentencing hearing at which a total of 21 witnesses testified for either the prosecution or for Carpenter about various aggravating and mitigating factors surrounding his crimes and his social

[2] Carpenter has never denied that he was in Thelma Young's house at the time of the murder, or that money was stolen from her bedroom. The day after the murder and robbery, Carpenter phoned 911 to report that he knew some information about the crimes, and later that day told the police that three men had kidnapped him at gunpoint, taken him to the victim's home, and then killed her in her hallway after locking him in the bathroom. The men then fled, according to Carpenter, and he found Thelma Young dead on the floor with a screwdriver in her mouth. Police found no evidence supporting that story, but did find blood spatters matching the victim's blood type on Carpenter's pants and shirt, as well as blood on his socks and shoes. The lenses from Carpenter's eyeglasses were found at the crime scene, and a bloody screwdriver was found in the trunk of his car. (Tr. of 3/29/90 plea hearing at 41-70, filed as record entry #5 in the district court.)

history, the three-judge panel imposed a penalty on Carpenter of life imprisonment with parole eligibility after 30 years.

Carpenter appealed, through counsel, alleging that the evidence presented at the sentencing hearing established that he should have received a sentence of life imprisonment with parole eligibility after 20 years rather than 30. The appeal did not challenge the validity of Carpenter's guilty pleas themselves, the sufficiency of the prosecution's evidence against him, or the way in which the prosecution presented the facts to the trial court before that court accepted his guilty pleas. The court of appeals affirmed Carpenter's sentence, *see* 1991 WL 35009 (March 12, 1991), and Carpenter did not appeal that decision to the Ohio Supreme Court.

The following year, Carpenter filed a *pro se* petition for post-conviction relief in the state trial court. The trial court dismissed the petition on June 18, 1992, finding it too conclusory to state any valid grounds for relief under O.R.C. 2953.21, Ohio's post-conviction relief statute. The state court of appeals affirmed the dismissal, *see* 1992 WL 361815 (December 3, 1992), and the Ohio Supreme Court declined to review the case. *State v. Carpenter*, 66 Ohio St. 3d 1456, 610 N.E.2d 421 (1993).

On July 1, 1993, Rule 26(B) of the Ohio Rules of Appellate Procedure took effect. The relevant portion of that rule is reproduced on page 3 of this brief. The Ohio Supreme Court adopted that rule after holding that, in Ohio, a claim of ineffective assistance of appellate counsel must be raised not in a state trial court, but rather through an application for reconsideration filed in the state court of appeals. *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992).

The 1993 rule, which still governs ineffective-assistance-of-appellate-counsel claims in Ohio, gives criminal defendants 90 days – starting with the date on which the court of appeals files its judgment in the defendant's original state-court direct appeal – to raise such ineffective-assistance claims. Some Ohio appellate courts, including the one that had decided Carpenter's original direct appeal, determined that, for direct appeals resolved before the new rule took effect on July 1, 1993, the application deadline under the rule was 90 days after its effective date.

On July 15, 1994 – over a year after the new 90-day rule took effect – Carpenter (with the assistance of new post-conviction counsel) filed a Rule 26(B) ineffective-assistance-of-appellate-counsel claim with the Ohio court of appeals.[3] Carpenter alleged that his appellate counsel in his original appeal in 1990-91 had provided ineffective assistance by failing to challenge the sufficiency of the evidence presented by the prosecution at his guilty plea hearing.[4] The state court

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[3] Although the state court of appeals said in its opinion that Carpenter's Rule 26(B) application was filed *pro se*, J.A. 17, it was actually prepared with the assistance of counsel. The confusion is understandable, as the attorney's name appears on the cover of the Rule 26(B) application, but Carpenter himself signed the document.

[4] The nature of the "sufficiency" claim that Carpenter now says should have been raised on direct appeal appears somewhat unclear. He may intend to challenge the strength of the evidence that forms the factual basis of the guilty pleas. (As we understand it, this claim would allege that, while the evidence clearly links him to the crimes, it is not enough to show his intent to commit murder.) Or he may be attacking the method by which the prosecution put this evidence before the three-judge trial court that accepted his guilty pleas. (In this regard, the claim would be that the State should have presented sworn testimony rather than an unsworn statement of facts by the prosecutor, though Carpenter

of appeals did not reach the merits of Carpenter's Rule 26(B) application, however, and thus the court did not decide the merits of *either* the claim of ineffective assistance of appellate counsel *or* the underlying sufficiency claim that counsel allegedly should have raised. Instead, the court dismissed the application on September 29, 1994, finding that Carpenter had missed the 90-day window for filing such a claim once Rule 26(B) took effect on July 1, 1993. J.A. 17-20.[5] The appeals court found that Carpenter's reason for filing a late request to reopen his direct appeal – that he was not aware in 1990 that he could challenge the sufficiency of the evidence on direct appeal – was not "good cause" for his untimely application in 1994.

Carpenter appealed, but the Ohio Supreme Court affirmed the dismissal of his Rule 26(B) application without reaching the merits of the ineffective-assistance-of-appellate-counsel claim. Like the state court of appeals, the Ohio Supreme Court found that Carpenter had simply missed the deadline for raising such a claim in Ohio's courts. *State v. Carpenter*, 74 Ohio St. 3d 408, 659 N.E.2d 786 (1996) (*per curiam*). J.A. 21-22. The Ohio Supreme Court's one-line order reads simply: "The judgment of the court of appeals is

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and his trial counsel did not object to the latter approach at the plea hearing.) Or perhaps he means both. These issues, however, have never been resolved, and may be addressed on remand, if necessary.

[5] The Ohio Supreme Court later ruled that even those defendants who filed Rule 26(B) applications within 90 days after July 1, 1993 had to show "good cause" for not seeking appellate relief earlier under the predecessor provision of Rule 26(B). *State v. Reddick*, 72 Ohio St. 3d 88, 647 N.E.2d 784 (1995). In any event, Carpenter's July 15, 1994 application for reopening of his direct appeal was untimely even under the court of appeals' more lenient approach.

affirmed on authority of *State v. Reddick*." *Id.* at 22. The reference to *Reddick* (*see* n.5, above) makes clear that the state supreme court, like the court of appeals, never addressed the merits of Carpenter's ineffective-assistance claim, and dismissed the Rule 26(B) application solely on procedural grounds.

2. Federal habeas proceedings. On May 3, 1996 (shortly after the effective date of AEDPA), Carpenter filed a petition for a writ of habeas corpus under 28 U.S.C. 2254 in federal district court.[6] He alleged (1) insufficiency of the evidence supporting his plea and sentence, in violation of the Fifth and Fourteenth Amendments; (2) ineffective assistance of appellate counsel, in violation of the Sixth and Fourteenth Amendments; and (3) the denial of a meaningful opportunity for state-court review of his ineffective-assistance claim, in violation of the Fifth and Fourteenth Amendments. J.A. 23-31.

The district court determined that Carpenter had procedurally defaulted on his sufficiency-of-the-evidence claim by failing to raise it in his direct appeal, and the court found that this default was an adequate and independent state ground that foreclosed federal-court review of the claim. J.A. 40. Likewise, the district court found that Carpenter had failed to comply with Ohio's procedural rule, Rule 26(B), for raising ineffective-assistance-of-appellate-counsel claims. *Id.* at 41-42. However, in a ruling that the Sixth Circuit did not later reach on appeal, the district court concluded that Ohio's appellate courts varied in their application of the "good cause" exception to Rule 26(B)'s 90-day time limit. *Id.* at 42-43. For that reason, said the district court, Carpenter's procedural default in raising his ineffective-

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[6] AEDPA does not address the question presented in this case.

assistance claim did not pose an adequate state ground barring federal-court review of the claim. *Id.* at 42-44.[7]

Reaching the merits, then, of Carpenter's ineffective-assistance claim, the district court found that he was entitled to a writ of habeas corpus on that issue, and so granted the writ, conditioned on the reopening of Carpenter's direct appeal in the state appellate court, during which he would be permitted to challenge the sufficiency of the prosecution's evidence against him. Given this relief, the district court found it unnecessary to rule on the first and third claims in Carpenter's habeas petition.

Carpenter and the warden ("the State") both appealed. The court of appeals held that a procedurally defaulted ineffective-assistance claim, when serving as "cause" for the procedural default of some other habeas claim (here, the sufficiency claim), need not itself be "subjected to a procedural default analysis before it may constitute cause." J.A. 58. Carpenter had exhausted his ineffective-assistance-of-appellate-counsel claim by filing his Rule 26(B) application for reopening the direct appeal in 1994, and the court of appeals required no more. "True, the state court declined to rule on the merits of his ineffective assistance of appellate counsel claim because Carpenter filed the claim late, and according to the state court, without good cause for his delay." *Id.* at 60. The critical inquiry, however, according to the court of appeals, was simply whether Carpenter had *exhausted* his ineffective-assistance claim (by

[7] If this Court reverses the judgment below, the court of appeals on remand could consider this alternative ground, which its opinion did not reach. J.A. 65 n.13. We would, of course, continue to defend Rule 26(B)'s fixed deadline, with its "good cause" safety valve, against the charge of inadequacy for federal habeas purposes.

trying to raise the claim under Rule 26(B)), not whether the claim itself was *procedurally defaulted* (because it was raised too late).

> While the state court's denial of Carpenter's ineffective assistance of appellate counsel claim on procedural grounds now precludes him from raising the claim as an independent habeas claim, it does not preclude him from asserting the ineffective assistance of appellate counsel as cause for his state court procedural default of his sufficiency of the evidence claim. A petitioner is permitted to assert ineffective assistance of counsel as cause, even if the state court has denied the claim based on a procedural default, so long as the claim was presented to the state courts and it is exhausted.

Id. at 60.

Having held that Carpenter need not show any cause for the procedural default of his ineffective-assistance claim, the court of appeals then considered whether Carpenter's appellate counsel had provided constitutionally sufficient assistance to him in the direct appeal. At this point, the court of appeals' opinion becomes somewhat confusing. For several paragraphs (J.A. 62-65), the court of appeals discusses challenges to guilty pleas under Ohio law, and appears to conclude that Carpenter has a strong argument – based primarily on a recent opinion of the Ohio Supreme Court, *State v. Green*, 81 Ohio St. 3d 100, 689 N.E.2d 556 (1998) – that state law required the prosecution to support Carpenter's guilty plea with witness testimony rather than just the unsworn statement of a prosecutor. (J.A. 64.) The court does go so far as to say specifically: "We find that

[appellate counsel's] complete failure to raise such an integral part of Carpenter's case[,] and his raising of a significantly weaker claim, illustrates that his counsel was constitutionally ineffective." J.A. 64. But the court's opinion also has a footnote (*id.* n.11) that acknowledges that Carpenter's case may be distinguishable from *Green*, for while Carpenter's state court trial counsel apparently accepted the method by which the prosecution presented the factual basis for his guilty pleas (as the state court of appeals indicated in denying his Rule 26(B) application, *see* J.A. 19), there was no such stipulation in *Green*.[8]

[8] Furthermore, the court of appeals indicated that "[u]pon remand, the district court may rule on th[is] issue." (J.A. 64 n.11.) It is unclear what the court of appeals meant in this respect. Perhaps the court meant that a closer look at the relationship of Carpenter's case to *Green* would show that Carpenter's appellate counsel was not ineffective after all (as we believe), though that seems to conflict with the relief ordered, and with the court's statement that counsel's performance on state-law issues was deficient. Or perhaps it meant that the district court could determine whether anything at the plea hearing violated *federal* due process, as Carpenter alleged in the first count of his habeas petition. Or perhaps the court meant that the district court had authority to decide whether the prosecutor's method of presenting the facts at Carpenter's plea hearing violated *state law*, and that the district court could grant federal habeas relief for a state-law violation. But that last reading, though plausible from the face of the footnote, cannot be the case, as it is well-settled that a federal habeas court has no such power. *Engle v. Issac*, 456 U.S. 107, 119-20 (1982). In any case, the proper characterization of the footnote can be resolved on remand. (The district court has since recognized the confusion. *See* 5/18/99 Order directing Carpenter to articulate his position regarding the inconsistency between Sixth Circuit's mandate and footnote 11 of that court's opinion. J.A. 4.)

In any event, the court of appeals concluded that "Carpenter has asserted sufficient cause for his failure to raise the sufficiency of the evidence on direct appeal," and the court also found prejudice from that failure. J.A. 65. But having found a way to reach the merits of the defaulted sufficiency claim in habeas, the court of appeals did not in fact resolve the merits of that claim, stating that "we do not decide the claim here." (J.A. 65 n.12.) The court of appeals simply directed the district court to issue a writ of habeas corpus "conditioned upon the state court granting Carpenter a new culpability hearing in accordance with state and federal law." *Id.* at 66.[9]

This Court then granted certiorari to review the court of appeals' ruling that a habeas petitioner need not show cause for the procedural default of a habeas claim when that claim is invoked as the cause for some other procedural default.

SUMMARY OF ARGUMENT

In addition to the recent authority of *Stewart v. LaGrand*, 119 S. Ct. 1018, 1021 (1999) (*per curiam*), several basic and well-settled propositions collectively show that the court of appeals erred in this case. First, since *Wainwright v. Sykes*, 433 U.S. 72 (1977), this Court has consistently held that all procedurally defaulted claims presented for federal-court review under 28 U.S.C. 2254 must satisfy the cause-

[9] It is perplexing how the court of appeals could have ordered habeas relief without deciding the merits of the *sufficiency* claim, since the court of appeals explicitly acknowledged that "the state court's denial of Carpenter's ineffective assistance of appellate counsel claim on procedural grounds now precludes him from raising the claim as an independent habeas claim," J.A. 60, and so clearly did not grant habeas relief on *that* claim.

and-prejudice test. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle v. Issac*, 456 U.S. 107, 129 (1982). Second, this Court has specifically applied this cause-and-prejudice analysis to ineffective-assistance-of-counsel claims, including claims concerning counsel's performance during a criminal defendant's direct appeal. *See Coleman*, 501 U.S. at 755. Third, in *Carrier*, 477 U.S. at 492, the Court also held that, in order for the deficient performance of appellate counsel to serve as cause for another procedural default, this attorney misfeasance must be sufficiently egregious to constitute a Sixth Amendment violation, according to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Fourth, the Court further held in *Carrier* that an ineffective-assistance claim serving as cause must satisfy the exhaustion requirement of section 2254. *See* 477 U.S. at 489.

These propositions, virtually as a matter of deductive reasoning, yield the conclusion that a procedurally defaulted ineffective-assistance claim must satisfy cause-and-prejudice analysis to serve as cause for the procedural default of some other habeas claim. To start, the two holdings of *Carrier*, when put together, show that an ineffective-assistance claim must have been *presented* to the state courts, and be *meritorious* "as an independent claim" for a federal habeas court to consider the ineffectiveness as an excuse for the procedural default of another claim. *Id.* And because *Carrier* required presentment to preserve the state courts' *opportunity* to review a claim first, *Carrier* must mean that the default doctrine applies no less than does exhaustion, for the state courts' opportunity is foreclosed if the prisoner does not *properly* present his claims in state court before seeking habeas relief. If one cannot deduce this principle from *Carrier* alone, then one surely can do so by adding to the equation the unanimous view, expressed just last Term in

O'Sullivan v. Boerckel, 119 S. Ct. 1728 (1999), that the exhaustion and procedural default doctrines work together to require prisoners not only to *present* their habeas claims to state courts, but also to do so *properly* in compliance with the State's legitimate procedural rules. *See id.* at 1734 (majority opinion); *accord id.* at 1737 (dissenting opinion).

In sum, then, *Carrier* and *O'Sullivan* show that a federal court must have the power to grant habeas relief for a *Strickland* violation – *both* because the *Strickland* claim is meritorious *and* because the *Strickland* claim is properly before the court under section 2254 – in order for the federal court to use that claim as the cause for overcoming a State's independent and adequate procedural bar regarding another claim. But if (according to *Carrier* and *O'Sullivan*) an ineffective-assistance claim cannot serve as cause unless it is independently cognizable as a basis for habeas relief, and if (as *Coleman* held) a *procedurally defaulted* ineffectiveness claim is *not* independently cognizable in federal habeas *unless* it satisfies the cause-and-prejudice test, then it seems to follow necessarily that a procedurally defaulted ineffective-assistance claim cannot serve as cause for another procedural default unless it too satisfies the cause-and-prejudice test.

But more than just deductive logic supports this result. It also makes good sense – in light of the basic purposes of the procedural default doctrine – that a defaulted ineffective-assistance claim not qualify as cause for another default unless there is also cause for that default as well. The procedural default doctrine, essentially, is designed to assure that federal habeas review of claims challenging state-court convictions honor and respect state-law procedural rules that constitute independent and adequate barriers to state-court review of the same claims. It also ensures that prisoners who

do seek federal habeas relief first give state courts a *true* opportunity to review the merits of their federal claims. Only if there is a good reason, for which the convicted prisoner should not be responsible – "cause" – will a federal habeas court have the power to overlook the independent and adequate procedural bar (and even then, only if the prisoner can also show adequate "prejudice" from enforcement of the procedural bar). *Strickler v. Green*, 119 S. Ct. 1936, 1952 (1999).

This principle applies just as much to a claim asserted as the good reason, the cause, for breaching another state-law procedural rule as it does to that initial procedural breach itself. In other words, when a convicted prisoner violates a State's deadline for presenting a claim intended to excuse a previous missed deadline, the prisoner should be expected to show a good reason for missing this second deadline as well as the first.

This rule does not mean that the default of an ineffective-assistance claim *necessarily* and *always* precludes its use as cause to excuse another default. Instead, it means only that, even when used for cause, the defaulted claim must be subject to the same rules as any other defaulted claim presented to a federal habeas court. In sum, our position is simply this: missing the deadline for offering an excuse for an earlier missed deadline likewise requires an excuse.

ARGUMENT

Like so many of this Court's decisions interpreting and applying the statutes and rules that govern federal habeas claims, "[t]his is a case about federalism," *Coleman v. Thompson*, 501 U.S. 722, 726 (1991), for as was true in that case, this one too "concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." *Id.*

I. The Court Of Appeals' Holding Is Inconsistent With This Court's Decision In *Stewart v. LaGrand.*

According to the court of appeals, a procedurally defaulted ineffective-assistance claim may serve as the "cause" for the procedural default of some other federal habeas claim without any showing of cause for the procedural default of the ineffective-assistance claim itself. In short, said the Sixth Circuit, the cause-and-prejudice test does not apply when an ineffective-assistance claim, which is itself procedurally barred from habeas review, serves only the derivative purpose of excusing the procedural default of another habeas claim. Yet that is not what this Court said just last Term in *Stewart v. LaGrand*, 119 S. Ct. 1018 (1999), a *per curiam* summary reversal:

> Walter LaGrand's alternative argument, that his ineffective assistance of counsel claim suffices as cause [for the procedural default of his Eighth Amendment claim], also fails. . . . [T]he ineffective assistance claim is, itself, procedurally defaulted. The Arizona court held that Walter LaGrand's ineffective assistance arguments were barred pursuant to

> a state procedural rule . . . and Walter LaGrand has failed to demonstrate cause or prejudice for his failure to raise these claims on direct review.

119 S. Ct. at 1021. (In addition to procedurally defaulting on his ineffective-assistance claim in state court, the habeas petitioner in *LaGrand* also waived that claim in the federal district court. *Id.*)

As *LaGrand* now shows, federal habeas courts should apply the cause-and-prejudice test to *every* procedurally defaulted habeas claim, whether the defaulted claim is presented as a stand-alone claim or is offered merely as the cause for some other procedural default. The *LaGrand* approach embodies a proper respect for state procedural rules, whereas the judgment below does just the opposite, letting a habeas petitioner bring a defaulted claim to federal court for review when the State itself has declined to reach the merits of the claim in light of an independent and adequate state procedural bar. The Court should adhere to *LaGrand*, for as we show below, that decision – not the judgment below – is consistent both with the Court's habeas decisions of the past 30 years and with the principles of federalism and comity that underlie them.

II. All Procedurally Defaulted Claims, Including Ineffective-Assistance Claims, Are Subject To The Cause-And-Prejudice Test.

When a state prisoner fails to follow a State's procedural rules for raising federal constitutional claims, he frustrates the State's legitimate interest in resolving those claims in a particular forum at a specified time, and the Court has therefore long encouraged prisoners to go first to state

courts to remedy constitutional errors – and to do so when and how the States demand. *See Coleman*, 501 U.S. at 732 ("a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance").

To promote that important comity interest, the Court has consistently applied the cause-and-prejudice test to procedurally defaulted claims for over 20 years. *See Coleman*, 501 U.S. at 750; *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle v. Issac*, 456 U.S. 107, 129 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). That test requires prisoners to explain why they failed to comply with state procedural rules in raising their federal constitutional claims in state court, because state rules "serve[] [the State's] strong . . . interests in the finality of its criminal litigation." *Coleman*, 501 U.S. at 746, citing *Wainwright*, 433 U.S. at 88-90. The cause-and-prejudice test's "presumption against federal habeas review of claims defaulted in state court" protects those important interests. *Coleman*, 501 U.S. at 747. "Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," *Engle*, 456 U.S. at 128, and the cause-and-prejudice test serves an important gate-keeping function limiting those federal intrusions.

This Court, moreover, has been unambiguous in proclaiming that the cause-and-prejudice test applies "uniformly to all independent and adequate state procedural defaults." *Coleman*, 501 U.S. at 750-51. As the Court said in *Coleman*:

> We now make it explicit: In all cases in which a state prisoner has defaulted his

> federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.[10]

Id. at 750. The rule is uniform, the Court further explained, because the State's interests are the same whenever a federal habeas court decides a claim that a state court could not reach because of a valid state procedural rule. *See id.* (identifying those state interests as "channeling the resolution of claims to the most appropriate forum," "finality," and "having an opportunity to correct its own errors").

The rationale that supports the cause-and-prejudice test – that prisoners ought not be free to raise in federal habeas those claims that "were not resolved on the merits in the state proceeding due to [the prisoner's] failure to raise them there as required by state procedure," *Wainwright*, 433 U.S. at 87 – applies no less to an ineffective-assistance claim than to any other. And no one has ever suggested that a procedurally defaulted ineffective-assistance claim is or ought to be subject to a different test. Indeed, in *Coleman* itself, this Court specifically applied the cause-and-prejudice test to procedurally defaulted ineffective-assistance claims, including a claim concerning the performance of *appellate* counsel. *See also LaGrand*, 119 S. Ct. at 1021 (ineffective assistance of trial counsel).

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[10] Carpenter has not invoked the "fundamental miscarriage of justice" exception in this case.

III. An Ineffective-Assistance Claim May Not Serve As "Cause" For A Procedural Default Of Some Other Claim Unless That Ineffective-Assistance Claim Is Itself Cognizable In Federal Habeas.

Both parties, like the court below, agree that constitutionally ineffective assistance of counsel may serve as cause for the procedural default of some other habeas claim, just as the Court said in *Carrier*, 477 U.S. at 489 ("a claim of ineffective assistance . . . may be used to establish cause for a procedural default"). That rule makes eminent good sense, for "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not 'conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance.'" *Id.* at 488, citing *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980).

But to serve as cause for the procedural default of a habeas claim, an ineffective-assistance allegation must itself meet three critical tests. First, counsel's ineffective-assistance must have fallen below the standard set by the Sixth Amendment. Second, the ineffective-assistance claim must satisfy the exhaustion requirement. And third, the ineffective-assistance claim must have been *properly* presented to the state courts, and thus not be barred by an independent and adequate state ground. The court below agreed with the first two principles, but failed to appreciate the equally compelling force of the third.

A. Poor lawyering may not serve as cause unless it violates the Sixth Amendment.

"Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default." *Carrier*, 477 U.S. at 492. As the Court has made clear, "[s]o long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, [466 U.S. 668 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." *Carrier*, 477 U.S. at 488. That is, a prisoner may point to his lawyer's ineffectiveness as cause for his failure to comply with a State's procedural rules only where the lawyer's "identified acts or omissions were outside the wide range of professionally competent assistance," and were the result of something less than "reasonable professional judgment." *Strickland*, 466 U.S. at 690. Mere "[a]ttorney ignorance or inadvertence is not 'cause'" where it does not rise to a Sixth Amendment violation. *Coleman*, 501 U.S. at 753.

B. To serve as cause, a *Strickland* claim must be exhausted.

Not only must a claim of ineffective-assistance offered as cause for the procedural default of another habeas claim rise to the level of a Sixth Amendment violation, but that claim of attorney error must also have been presented by the prisoner to his state courts for review there first. The Court said so explicitly in *Carrier*: "the exhaustion doctrine . . . generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Carrier*, 477 U.S. at 488-89.

The Court there also explained the rationale for this holding: "if a petitioner could raise his ineffective assistance claim for the first time on federal habeas in order to show cause for a procedural default, the federal habeas court would find itself in the anomalous position of adjudicating an unexhausted constitutional claim for which state court review might still be available." *Id.* at 489. Consequently, the Court concluded: "The principle of comity that underlies the exhaustion doctrine . . . holds true whether an ineffective assistance claim is asserted as cause for a procedural default or denominated as an independent ground for habeas relief." *Id.*

C. An ineffectiveness claim must be not only presented, but properly so, to a state court before serving as cause in federal habeas.

In imposing this exhaustion requirement for claims offered as cause, *Carrier* did not do so to the exclusion of the procedural default doctrine. On the contrary, the Court in *Carrier* had no occasion to consider the question presented in *this* case, because the ineffective-assistance claim *there* was *not* defaulted. Indeed, in *Carrier*, the State explicitly acknowledged that the prisoner in that case "could bring an ineffective assistance of counsel claim in the state courts to establish that his procedural default should be excused." *Carrier*, 477 U.S. at 483. Thus, the *Carrier* Court's discussion of the exhaustion requirement should be understood simply as the Court's identification of the particular procedural principle that was necessary to resolve that case. In no way was the Court's discussion of exhaustion intended to cast doubt on the applicability of the procedural default doctrine as well, where, as here, a defaulted ineffective-assistance claim is offered as cause for another default.

Indeed, quite the opposite: the reasoning of *Carrier* supports the more general proposition that an ineffective-assistance claim can serve as cause only when that claim has been *properly* presented to the state courts before being raised in federal habeas. The key idea in *Carrier* is that the state courts must be able to assess for themselves the merits of ineffective-assistance claims before they are considered in federal habeas. *See* 477 U.S. at 489. But state courts cannot assess for themselves the merits of an ineffective-assistance claim that is procedurally barred, and this is true even if the claim has been presented late to the state courts and thus satisfies the exhaustion requirement.

Consequently, the principles and policies that underlie *Carrier*'s exhaustion requirement dictate that the ineffective-assistance claim, to serve as cause, be one that the state courts could have decided on the merits. Indeed, only last Term did the Court reiterate: "we ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, i.e., whether he has fairly presented his claims to the state courts." *O'Sullivan v. Boerckel*, 119 S. Ct. 1728, 1734 (1999) (emphasis added). Indeed, there was unanimity on this point: "A habeas petitioner who has concededly exhausted his state remedies must also have *properly* done so by giving the State a fair 'opportunity to pass upon [his claims].' *Darr v. Burford*, 339 U.S. 200, 204 (1950)." *Id.* at 1737 (Stevens, J., dissenting) (emphasis added).

As Justice Stevens explained in reasoning shared by all members of this Court, "[i]f we allowed state prisoners to obtain federal review simply by letting the time run on adequate and accessible state remedies and then rushing into the federal system, the comity interests that animate the

exhaustion rule could easily be thwarted." *O'Sullivan*, 119 S. Ct. at 1737 (Stevens, J., dissenting). *See also id.* at 1734 (majority opinion) ("As Justice Stevens notes, a prisoner could evade the exhaustion requirement – and thereby undercut the values that it serves – by 'letting the time run' on state remedies."). In thinking that exhaustion suffices to serve the principle of comity, without any need for the corollary doctrine of procedural default, the court of appeals simply missed this fundamental point. Indeed, it is no accident that both *Carrier* and *O'Sullivan*, at crucial junctures in their reasoning, quote from the same page of the Court's much earlier opinion in *Darr v. Burford*, 339 U.S. 200, 204 (1950). *Compare Carrier*, 477 U.S. at 489 with *O'Sullivan*, 119 S. Ct. at 1737 (Stevens, J., dissenting).

Both *Carrier* and *O'Sullivan* capture the same point – namely that state courts must have a genuine "opportunity to pass upon" a constitutional claim, and thus a genuine "opportunity . . . to correct a constitutional violation," before a federal court may consider that same claim. *Darr*, 339 U.S. at 204. This is the relevant principle of comity, and it provides the common foundation for both the exhaustion requirement and the procedural default doctrine. This same principle of comity also "holds true whether an ineffective assistance claim is asserted as cause for a procedural default or denominated as an independent ground for habeas relief." *Carrier*, 477 U.S. at 489. Thus, because comity requires exhaustion before a *Strickland* claim may serve as cause, comity also requires application of procedural default rules before the *Strickland* claim may serve as cause.

In its contrary holding, moreover, the court below in fact made the same kind of mistake that the Fourth Circuit made in the proceedings leading up to the Court's decision in *Carrier*. The court of appeals had said in that case that "[t]he

exhaustion requirement . . . pertains to independent claims for habeas relief, not to the proffer of *Wainwright* cause and prejudice." *Carrier*, 477 U.S. at 484 (quoting *Carrier v. Hutto*, 724 F.2d 396, 402 (4th Cir. 1983)). Substitute the words "procedural default" for "exhaustion" in that sentence, and we have the essence of the court of appeals' decision in this case.

But just as the Fourth Circuit was wrong with respect to exhaustion in *Carrier*, so too the Sixth Circuit is wrong with respect to procedural default here. The rationale supporting the Court's decision in *Carrier* applies no less to this case, for "[j]ust as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Coleman*, 501 U.S. at 731-32. Indeed, preventing federal habeas consideration of claims that state courts – because of valid procedural rules – could not have addressed themselves is the whole purpose of applying the independent-and-adequate-state-ground doctrine in habeas as well as on direct review. *Coleman*, 501 U.S. at 730.

IV. A Procedurally Defaulted Ineffective-Assistance Claim May Not Serve As "Cause" For The Procedural Default Of Another Habeas Claim, Unless There Is Also "Cause" For The Default Of The Ineffectiveness Claim Itself.

If the foregoing analysis of *Carrier* and *O'Sullivan* is correct, then an ineffective-assistance claim may not serve as cause for a procedural default unless the ineffectiveness claim itself satisfies procedural default analysis. But, of course, as *Coleman* tells us, a defaulted ineffective-assistance

claim, like any other kind of claim, cannot withstand this analysis unless the habeas petitioner shows cause and prejudice for *this* default. Thus, from these premises, it necessarily follows that a defaulted ineffective-assistance claim cannot serve as cause unless there is also cause for defaulting the ineffectiveness claim itself. Although this deductive reasoning should suffice to show that the court of appeals erred in its analysis of this Court's prior precedents, we do not rest our case on logic alone. On the contrary, the basic values that underlie the procedural default doctrine, as well as the inappropriate practical impact of the Sixth Circuit's decision, amply support the conclusion that this Court should reverse that decision.

The court below found that procedurally defaulted claims can serve as cause for other defaults because exhaustion alone is "sufficient, and ensures that the state court has the first opportunity to hear" those claims offered as cause. J.A. 61. Exhaustion, however, asks only whether state remedies are *still available* when a prisoner files in federal habeas, and so the exhaustion requirement is *technically* met whenever a prisoner has procedurally defaulted, as state court remedies are then no longer available. But, as we just demonstrated in the previous part of this brief, federal courts reviewing claims in habeas ask not only *whether* claims are exhausted, but also *how* the prisoner exhausted them. By permitting habeas petitioners to raise procedurally defaulted – albeit exhausted – claims as cause for other procedural defaults, the approach followed by the court of appeals actually rewards those prisoners who (by design or by mistake) simply run out the clock until the last available state court remedy is foreclosed. That option to bypass state court review without consequence is hardly consistent with the principles of comity and federalism that habeas courts ought to respect.

Here, though Robert Carpenter missed the State's deadline for raising an ineffective-assistance claim, the court below has used that defaulted claim to excuse another missed deadline, without asking Carpenter to justify the late filing of the ineffective-assistance claim itself. No sound rationale supports the court of appeals' view that he must justify the earlier default (of his sufficiency-of-the-evidence claim), but not his later default of the ineffective-assistance claim. Surely before raising his counsel's ineffective assistance as the cause for the earlier default, federal courts ought to require him to explain why he in turn missed the State's deadline for raising the ineffective-assistance claim itself. Had he met the State's deadline, he at least would have been entitled to a ruling on the merits of that claim. By filing late, he missed that opportunity, and federal courts ought to ask him to explain why.

Suppose that Carpenter defaulted on a particular claim in state court (as he in fact did) by failing to raise the claim in his direct appeal. But then suppose that he had complied with the State's deadline for raising an ineffective-assistance-of-appellate-counsel claim. This second step in our scenario, of course, Carpenter did not do. Had he done so, though, the state court of appeals would have addressed the merits of his ineffectiveness claim, and perhaps would have granted him relief. *See* Ohio App. R. 26(B) ("[a]n application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal"); *id.* ("[i]f the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment"). And even if the state court of appeals had not granted him relief, he could have sought further review of the ineffective-assistance claim on the

merits in the Ohio Supreme Court,[11] and ultimately could have petitioned for certiorari in this Court on the merits of his ineffective-assistance claim.

Assuming that our "hypothetical Carpenter" in the scenario described above had lost on the merits of his ineffective-assistance claim in this state-court process, he could then quite properly have headed next to federal court, and there asked that court in habeas to revive his defaulted sufficiency-of-the-evidence claim – by alleging that his ineffective appellate lawyer caused him to miss the opportunity to raise that sufficiency claim on direct review. *But that is just the relief that the "real Carpenter" in fact sought – and received – in the Sixth Circuit, despite having failed to comply with the deadline for the state court proceedings available to him that we describe above.* Though he did not properly take advantage of the opportunity Ohio offers for fixing ineffective-assistance violations, and did not give Ohio the opportunity to review that claim in the place and at the time that Ohio provides to prisoners for review of such claims, the real Carpenter is now no worse off than our hypothetical Carpenter, who did comply with the State's rules and did properly present the ineffective-assistance claim to his state courts for a decision on the merits.

Why should federal courts treat the two habeas petitioners just alike, when Ohio itself does not? Why should our real prisoner, who disregarded the State's rules by filing "the claim late, and according to the state court, without good cause for his delay," J.A. 60, be no worse off in

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[11] This review in the Ohio Supreme Court is mandatory in capital cases and discretionary in all others. Ohio Sup. Ct. Prac. R. II(1)(A).

federal court than the hypothetical prisoner, who complied with the State's rules and secured a decision on the merits of his claim in state court? By treating the two just alike, the court below created a marked "inconsistency between the respect federal courts show for state procedural rules and the respect they show for their own." *Coleman*, 501 U.S. at 751. If Ohio may rightly require prisoners to raise ineffective-assistance claims by a particular time and in a particular forum, and properly treats those who comply with those rules differently from those who do not, then "[n]o less respect should be given to [those] state rules of procedure" by the federal courts in habeas. *Id.*

State procedural rules "serve vital purposes at trial, on appeal, and on state collateral attack," *Carrier*, 477 U.S. at 490, for they "channel[], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Reed v. Ross*, 468 U.S. 1, 10 (1984). Ohio, like every State, sets deadlines for raising federal constitutional claims in order to protect "its important interest in finality," *id.* at 750, and to force prisoners to bring their claims to state court at a time and place where they can best be resolved on the merits. And because Carpenter failed to follow state procedural rules, the State has every right to regard his challenge to his counsel's effectiveness at an end – not because that claim has no merit (though we think that is true) but because he never presented that challenge in the way that Ohio's rules require. Those rules deserve no less respect from the federal judiciary than they receive in Ohio's courts, and the judgment below holding otherwise should be reversed.

When a prisoner can show cause for and prejudice from his procedural default of an ineffective-assistance claim, we readily concede that he then ought to be free to raise that claim as cause for some other procedural default. In that case, ineffective assistance (if it meets the *Strickland* standard) may be properly reviewed by federal courts, both as a habeas claim in its own right, and as the cause for some other procedural default. Our view, then, does not threaten the legitimate right of state prisoners to raise their habeas claims in federal court.

The cause-and-prejudice test, ultimately, boils down to a straightforward message from federal courts to state prisoners: "tell us why we should listen to you now when you could have fixed this problem elsewhere." That rule has long applied when a prisoner has missed one deadline, and it ought to apply just as strongly when he misses a second. If the prisoner *can* explain both missteps, then we agree that his claims deserve review in federal court. But by asking him to explain only the first misstep, the court below failed to honor "the concerns of comity and federalism" on which "the independent and adequate state ground doctrine is grounded." *Coleman*, 501 U.S. at 730.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals and remand the case for further proceedings.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY*
State Solicitor
**Counsel of Record*
DAVID M. GORMLEY
STEPHEN P. CARNEY
Associate Solicitors

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APPENDIX

Rule 26 of the Ohio Rules of Appellate Procedure provides as follows:

Rule 26. Application for reconsideration; application for reopening

(A) Application for reconsideration.

Application for reconsideration of any cause or motion submitted on appeal shall be made in writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later. The filing of an application for reconsideration shall not extend the time for filing a notice of appeal in the Supreme Court.

Parties opposing the application shall answer in writing within ten days after the filing of the application. Copies of the application, brief, and opposing briefs shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(B) Application for reopening.

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;
(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.[;]
(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;
(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;
(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) Appoint counsel to represent the applicant if the applicant is indigent and not currently represented;
(b) Impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to App. R. 9 and 10 shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

(C) [Ruling upon application for reconsideration.]

If an application for reconsideration under division (A) of this rule is filed with the court of appeals, the application shall be ruled upon within forty-five days of its filing.